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Supreme Court, U.S.
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No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Brian R. Zimmerman, *et al.*,

Petitioners,

v.

Volkswagen of America, Inc., and
Volkswagen Aktiengesellschaft,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act preserves common law claims from federal preemption by expressly stating that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law," 15 U.S.C. § 1397(k); or whether, as the Supreme Court of Idaho held, *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), requires a finding that common law claims are preempted whenever an auto manufacturer complies with a Federal motor vehicle safety standard?

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OPINIONS BELOW

The opinion of the Supreme Court of Idaho (App. 1-12) is reported at 920 P.2d 67. The order of the state district court granting defendants' motion for summary judgment (App. 13-15) and the order of the Supreme Court of Idaho denying petitioners' motion for rehearing (App. 16) are not reported. On October 15, 1996, petitioners were granted an extension of time until December 6, 1996, to file this petition.

JURISDICTION

The Supreme Court of Idaho entered judgment on May 24, 1996. App. 1. Rehearing was denied on August 8, 1996. App. 16. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act, as codified when the vehicle at issue in this case was manufactured, provided in pertinent part:

> **15 U.S.C. § 1392(d). Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or state governments.** Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in

this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * * *

15 U.S.C. § 1397(k). Continuation of common law liability. Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act "without substantive change" (Pub. L. No. 103-272, 108 Stat. 745, 941). The new Code provisions, in relevant part, are as follows:

49 U.S.C. § 30103. Relationship to other laws.

(b) **Preemption.** (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise

applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

* * * *

(e) **Common Law Liability.** Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

All of the applicable preemption cases, including the decisions by the two courts below, discuss the provisions as codified before the 1994 recodification. This petition, therefore, uses the citations employed in those decisions.

STATEMENT OF THE CASE

On March 24, 1989, Dorothy Zimmerman was making a left turn in her 1987 Volkswagen Golf when a pick-up truck collided with her car. Ms. Zimmerman's Volkswagen was equipped with an automatic shoulder harness (anchored to the seat on her right and the door on her left) and a padded knee bar under the dash (designed to keep the driver in place), but it was not equipped with a lap belt. As a result, Ms. Zimmerman was thrown into the shoulder harness, which lacerated her liver. She later died of internal hemorrhaging caused by the laceration. App. 2.

On December 13, 1990, Ms. Zimmerman's husband, children, and mother (collectively, "the Zimmermans") filed this state common law suit for strict liability in tort against Volkswagen of America, Inc., and Volkswagen Aktiengesellschaft (collectively, "VW"), alleging that the 1987 Volkswagen Golf was defectively designed because it lacked a driver's-side lap belt. The suit further alleges that, if the car had not been defectively designed, Ms. Zimmerman would have survived the crash.[1]

When the 1987 Volkswagen Golf driven by Dorothy Zimmerman was manufactured, federal regulations promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* ("the Safety Act") -- specifically, Federal Motor Vehicle Safety Standard 208 -- did not prohibit VW from installing a lap belt in the Volkswagen Golf or any other car. Standard 208 did, however, require VW to install some form of passive restraint in at least 10 percent of its 1987 model-year cars. 49 C.F.R. § 571.208. It also required all cars to have, at a minimum, either (1) a manual lap belt and shoulder harness, (2) an automatic belt system providing at least a specified level of protection in head-on crashes, or (3) an airbag or other device

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[1] The Zimmermans also sued the driver and owner of the pick-up truck and the Volkswagen dealer who sold the car to Ms. Zimmerman. The claims against those defendants have been resolved.

providing automatic protection in both head-on and angular crashes. *Id.* VW chose the second option, installing an automatic belt system in the 1987 Golf, but did not include a lap belt with the system, although it was free to do so under that option. In this case, the Zimmermans allege that VW acted negligently by failing to do more than the minimum that Standard 208 required.

On August 2, 1993, VW moved for summary judgment on federal preemption grounds, asserting that, even if VW's actions violated Idaho common law and caused Dorothy Zimmerman's death, VW is exempt from liability because it complied with Standard 208. VW argued, among other things, that the Zimmermans' claims are expressly preempted by the Safety Act's preemption clause, 15 U.S.C. § 1392(d), which provides, *inter alia*:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

The Zimmermans responded, in part, by relying on the Safety Act's anti-preemption (or savings) clause, 15 U.S.C. § 1397(k), which provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." They contended that Congress' plain words precluded any finding of preemption and that, in any event, their claims simply did not conflict with federal law.

On October 20, 1993, the trial court granted VW's motion. In a three-page order, it held plaintiffs' claims both expressly and impliedly preempted. App. 14.

On May 24, 1996, the Supreme Court of Idaho unanimously affirmed. Based on this Court's ruling in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) (*"Freightliner"*), it held that plaintiffs' claims are expressly preempted by the Safety Act. Explaining its reasoning, the Supreme Court of Idaho noted that, in *Freightliner*, this Court found that the Safety Act did not expressly preempt common law claims alleging a negligent failure to install anti-lock brakes in trucks because there was no federal standard in effect under the Act governing the aspect of vehicle performance (truck stopping distances) involved in the case. App. 7 (citing *Freightliner*, 115 S. Ct. at 1487). In this case, however, a federal standard -- Standard 208 -- is in effect. Given that fact, the Supreme Court of Idaho concluded that *Freightliner* required a finding of express preemption:

> Implicit in the [U.S. Supreme] Court's rejection of express preemption in *Freightliner* is its recognition of the preemptive effect of Section 1392(d) in those cases where a standard specifically addresses the aspect of performance in question. In this action there exists a federal standard that directly addresses the performance requirements of automobile restraint systems to protect vehicle occupants during crashes. Hence we find . . . that the claims against Volkswagen for failure to include a lap belt with [its system] are preempted by the express provisions of the Safety Act.

App. 7. Because it found the Zimmermans' common law claims expressly preempted, the Supreme Court of Idaho did not address VW's "contention that these claims are impliedly preempted as well." App. 7.

REASONS FOR GRANTING THE WRIT

When Congress enacted the Safety Act in 1966, it unequivocally stated the preemptive effect that compliance with a Federal safety standard was to have on common law liability: "Compliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added). The Supreme Court of Idaho's express preemption decision contravenes these plain words and conflicts with the ruling of every federal appeals court and state court of last resort to address the preemption issue. In so doing, it both adds to and exacerbates the conflict that already exists among these courts on whether -- and the extent to which -- Congress' words preclude a finding that common law claims are impliedly preempted. The Supreme Court of Idaho's express preemption decision also demonstrates, and increases, the confusion created by this Court's decision in *Freightliner* about the Safety Act's preemptive effect. Finally, the Supreme Court of Idaho's decision incorrectly answers an important federal question that has not been, but should be, decided by this Court -- whether Congress intended the Safety Act to preempt state common law claims. This Court should grant review to resolve the conflict among the federal courts of appeal and state courts of last resort, eliminate the confusion caused by *Freightliner*, and decide whether Congress' words mean what they say.

1. There Is An Irreconcilable Conflict Among the Federal Courts of Appeal and the State Courts of Last Resort Over Whether the Safety Act Preempts Common Law Claims.

The Supreme Court of Idaho's express preemption decision massively expands and exacerbates the growing conflict among the federal courts of appeal and the state courts of last resort over the Safety Act's preemptive effect. Only this Court can bring the conflict to an end. If this Court does not step in, the conflict will only get worse, as the decision below reflects.

The Safety Act was enacted in 1966. During its first two decades, eight federal circuit courts and five state courts of last resort addressed whether compliance with federal motor vehicle safety standards issued pursuant to the Safety Act exempts auto manufacturers from liability under common law. Some phrased the question as whether compliance with federal standards constitutes a defense; others asked whether compliance results in federal preemption. Each, however, reached the same conclusion: Congress' words mean what they say -- "Compliance with any federal motor vehicle safety standard adopted under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

Thus, in the first such case to reach a federal court of appeals, *Larsen v. General Motors Corporation*, 391 F.2d 495, 506 (8th Cir. 1968), the Eighth Circuit stated:

> Section 108(c) of the Act, 15 U.S.C. § [1397(k)], expressly negatives any intention of Congress to acquire exclusive jurisdiction in this field and leaves the common law liability intact . . . It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability.

Accord Knippen v. Ford Motor Co., 546 F.2d 993, 1000 (D.C. Cir. 1976); *Fox v. Ford Motor Co.*, 575 F.2d 774, 778 (10th Cir. 1978); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1198 (Ala. 1985); *Volkswagen of*

America, Inc. v. Young, 272 Md. 201, 321 A.2d 737, 746 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683, 688 (1976); *Arbet v. Gussarson*, 66 Wis. 2d 551, 225 N.W.2d 431, 438 (1976).

In several of these cases, the plaintiffs' claims, if successful, might arguably have prompted the manufacturers to alter their conduct on a nationwide basis. The courts were aware of this fact, and sometimes questioned Congress' judgment, but nevertheless concluded that Congress had, indeed, intended to preserve such common law claims. For example, in *Dawson*, 630 F.2d at 962-63, the jury found that a side-door design provided inadequate crash protection despite the fact that it complied with Standard 214. The Third Circuit stated:

> The effect of [15 U.S.C. § 1397(k)] is that the states are free, not only to create various standards of liability for automobile manufacturers with respect to design and structure, but also to delegate to the triers of fact in civil cases arising out of automobile accidents the power to determine whether a particular product conforms to such standards. . . In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile safety standards . . . *Inasmuch as it was the Congress that designed the system, and because Congress is the body best suited to evaluate and, if appropriate, to change the system, we decline today to do anything in this regard except to bring the problem to the attention of the legislative branch.*

Dawson, 630 F.2d at 962-63 (emphasis added).

Similarly, in *General Motors Corporation v. Edwards*, 482 S.2d at 1180, the jury found that the placement of the gas tank in

the "crush zone" between the rear bumper and axle was negligent, despite its compliance with Standard 301. Affirming the verdict, the Supreme Court of Alabama noted that the jury's decision had "potential national implications," but, fully in keeping with Congress' intent, "refuse[d] to . . . hold" that the standards set by the federal government were "conclusive." *See also Knippen*, 546 F.2d at 1000 (turning signal and parking light design complying with Standard 108 found defective); *Dorsey*, 655 F.2d at 656-57 (numerous design aspects complying with federal standards found insufficiently crashworthy); *Shipp*, 750 F.2d at 421 (roof design complying with Standard 216 found insufficiently crush-resistant); *Sours*, 717 F.2d at 1516-17 (same as *Shipp*); *Fox*, 575 F.2d at 778 (rear passenger restraint system found defective because it lacked rear shoulder harnesses, which Standard 209 did not require); *Volkswagen*, 321 A.2d at 746 (fuel tank design complying with Standard 301 found insufficiently crush-resistant); *Arbet*, 225 N.W. 2d at 438 (same as *Volkswagen*).

In the past decade, however, the federal appeals courts and state courts of last resort have dramatically split -- both from their prior rulings and with each other -- over whether compliance with federal standards adopted under the Safety Act exempts manufacturers from liability under common law, particularly in cases involving the failure to install lap belts, shoulder harnesses, and/or airbags. As a result, after twenty years of harmony regarding the Safety Act's preemptive effect, the courts are now hopelessly in conflict over (a) whether the Safety Act expressly preempts common law claims, (b) whether the Safety Act's savings clause precludes resort to implied preemption analysis, (c) whether the Safety Act impliedly preempts common law claims, and (d) if it does, which ones and why.[2]

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[2] The reasons why this conflict developed in the last decade -- the Third Circuit's improper expansion of implied preemption in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *rev'd in part and aff'd in part*, 112 S. Ct. 2608 (1992), and the confusion caused by this Court's decision in *Freightliner*, 115 S. Ct. at 1483 -- are reviewed in Section 2 below.

Thus, three federal courts and one state supreme court have held that the Safety Act does not *expressly* preempt common law claims, but does *impliedly* preempt them. These courts, moreover, have adopted widely varying implied preemption theories, some of which extend way beyond claims involving a failure to install lap belts, shoulder harnesses, or airbags.

In the first such case, *Wood v. General Motors Corp.*, 865 F.2d 395, 410 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), the First Circuit held that the Safety Act does not expressly preempt any common law claims, but that it impliedly preempts *design defect* claims. It noted that section 1392(d), as written, would preempt a state regulation requiring the installation of airbags in all cars and conceded that section 1397(k), as written, preserved all common law claims, including claims challenging the manufacturer's failure to install an airbag. It could see no reason, however, why Congress would have wanted to preserve common law claims that might have the same regulatory effect as a regulation that section 1392(d) would preempt. It, therefore, concluded that Congress must have written both sections as it did because, in 1966, "the only kind of legal claim which could give rise to the present dilemma -- a cause of action based upon alleged automobile design defect -- had yet to take its place in the arsenal of the plaintiffs' bar." *Wood*, 865 F.2d at 402. It found plaintiffs' "no-airbag" claim impliedly preempted on a theory that would preempt almost all design defect claims.

In *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), the Tenth Circuit simply adopted the First Circuit's ruling in *Wood*, without explaining how this result comported with its 1976 affirmance of the verdict in *Fox v. Ford Motor Company*, 575 F.2d at 778, the rear shoulder harness case. Just eleven months ago, the Tenth Circuit reaffirmed its commitment to *Kitts* in *Montag v. Honda Motor Co. Ltd.*, 75 F.3d 1414, 1417 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996).

The Third Circuit also found implied preemption under the Safety Act, but on much more narrow grounds. In *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1121 n.6 (3d Cir. 1990), it disagreed with both *Wood* and *Kitts* and held that common law claims alleging a failure to install airbags or automatic safety belts are impliedly preempted because, in its view, Standard 208 gave manufacturers the option not to install those types of passive restraints. *Pokorny*, 902 F.2d at 1123-25, 1126 n.11. It ruled, however, that common law claims alleging a failure to install protective netting are not preempted because Standard 208 did not give manufacturers the option not to install *that* type of passive restraint. *Id.* at 1126. It distinguished its prior ruling in *Dawson*, 630 F.2d at 957-58, on the (incorrect) ground that "there was no federal standard governing the particular design said to be defective in *Dawson*, and thus there was no asserted conflict between federal standards and common law liability." *Pokorny*, 902 F.2d at 1122. More recently, the Third Circuit has made clear that its implied preemption rationale in *Pokorny* affects cases involving other design defect claims, too. In *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3d Cir. 1992), it held that, under *Pokorny*, Standard 108 (which establishes minimum illumination requirements for vehicles) does not impliedly preempt all common law claims relating to illumination and lighting equipment, but does limit the *type* of claims related to those matters that can be pursued. *Buzzard*, 966 F.2d at 784 n.11.

The Supreme Court of Mississippi has also found implied preemption of common law claims challenging an auto manufacturer's failure to install an airbag. *Cooper v. General Motors Corp.*, No. 92-CA-01334-SCT, 1996 WL 272363 (Miss. 1996), *petition for reconsideration pending* (filed June 19, 1996). In broad language that effectively read the savings clause out of the Safety Act, it said:

> This federal law . . . has a preemption clause that prohibits any conflicting state laws on the same matter, and a savings clause permitting any state

> common law actions. We do not see a conflict in these two sections. It does not take a genius to figure out that the preemption clause tells states that they cannot have any nonidentical laws on any area which is being governed by federal regulations, and *for those areas in which there are no regulations, the states can still apply their common law.* The savings clause merely underscores the right of consumers to bring nonpreempted common law claims; it does not undermine the explicit preemptive language in the statute.

Cooper, 1996 WL 272363 at *16 (emphasis added). A vigorous dissent aptly observed, "Perhaps the majority should instead refer to the Safety Act as the 'Automobile Manufacturer Limited Liability Act' or the 'Automobile Manufacturer Profit Protection Act.'" *Id.* at *19.

Like the four foregoing courts, the Eleventh Circuit once held that the Safety Act impliedly preempts common law claims, but it has since reversed course. In *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied* 495 U.S. 1065 (1990), *rev'd in part, Myrick v. Fruehauf Corp*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom. on other grounds Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), the Eleventh Circuit held common law claims involving the failure to install airbags impliedly preempted because they "frustrate the federal regulatory scheme." *Taylor*, 875 F.2d at 827. Two years ago, however, the Eleventh Circuit held in *Myrick v. Fruehauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom. on other grounds Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), that this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. at 2608, negated its implied preemption ruling in *Taylor* and that the Safety Act expressly preserves all common law claims. This Court affirmed the ruling in *Myrick* on other grounds in *Freightliner* and, eight months ago, the Eleventh Circuit reiterated its holding in *Myrick*

that "standards promulgated under the National Traffic and Motor Vehicle Safety Act do *not* preempt common law claims." *Doyle v. Volkswagenwerk Aktiengelellschaft*, 81 F.3d 139, 141 (11th Cir. 1996) (emphasis in original).

The Fifth Circuit reached a similar conclusion in *Perry v. Mercedes Benz of North America*, 957 F.2d 1257 (5th Cir. 1992), which held that, when an airbag system has been installed, a state common law claim for defective design of the system is not preempted. *Id.* at 1264. *Perry* did not reach the issue of whether the Safety Act preempts common law claims complaining of the simple failure to install an airbag, lap belt, or shoulder harness. *Id.* at 1265.

Three state supreme courts, however, *have* reached that issue and each has found no preemption -- in direct contrast to the First, Tenth, and Third Circuits, and the Mississippi Supreme Court. In *Ford Motor Company v. Tebbetts*, 165 A.2d 345 (N.H. 1995), *cert. denied* 116 S. Ct. 773 (1996), the Supreme Court of New Hampshire held that section 1397(k) plainly evidences Congress' intent to preserve *all* common law claims, including claims involving the failure to install airbags, and bars any finding of express or implied preemption.

The Supreme Court of Indiana agrees. In *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995), it found section 1397(k) conclusive, too, and held that the auto manufacturer's implied preemption arguments could not be considered. The Supreme Court of Indiana discussed in detail -- and noted its disagreement with -- the federal appeals court decisions finding implied preemption. *Id.* at 334-39. It held that, even if the manufacturer's implied preemption arguments could be considered, they had to be rejected, since there is no conflict between Standard 208 and a common law claim alleging negligent failure to install an airbag. *Id.* at 339.

The Supreme Court of Arizona also ruled that section 1397(k) requires a finding of no preemption and bars implied preemption analysis in a case, like the instant one, involving VW's failure to include a lap belt in one of its cars. *Hernandez-Gomez v. Volkswagen of America, Inc.*, 884 P.2d 183 (Ariz. 1994), *vacated and remanded*, 115 S. Ct. 1819 (1995). After this Court vacated and remanded that decision for reconsideration in light of *Freightliner*, the Supreme Court of Arizona again found no preemption. *Hernandez-Gomez v. Volkswagen of America, Inc.*, 917 P.2d 236 (Ariz. 1996). This time, however, it issued a split decision, with the majority finding that implied preemption *might* (or might not) be considered, but that, even if it is, implied preemption cannot be found in cases involving cars that roll over, since VW complied with a portion of Standard 208 that only addresses front-end crashes. *Id.* at 246.

While the foregoing appellate courts conflict starkly over whether the Safety Act *impliedly* preempts any common law claims (and, if so, on what basis), the federal appeals courts and state courts of last resort unanimously agreed that the Safety Act does not *expressly* preempt any common law claims -- until the ruling by the Supreme Court of Idaho in this case.[3] As a result of the ruling below, the range of the conflict is now complete. The federal appeals courts and state courts of last resort now disagree about virtually every aspect of the preemption dispute.

This ongoing dispute about the Safety Act's preemptive effect has serious practical consequences. There are currently thousands of automobile design defect lawsuits pending throughout the nation, hundreds of which involve the manufacturers' failure to install lap belts, shoulder harnesses, and/or airbags. The preemption issue has been raised or is lurking in each of these

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[3] *But see Cooper v. General Motors Corp*, 1996 WL 272362 at *5 ("In the case sub judice, there appears to be both express preemption, under § 1392(d), and implied preemption . . . [but] this Court will filter this case through an implied preemption grid.").

cases. The legal and judicial resources being spent on this issue are mushrooming rapidly, with no end to the conflict in sight.[4]

The time has come for this Court to end this conflict. To do so, it should grant review in this case. If it does not, the conflict will only continue, primarily because of the confusion created by *Freightliner*.

2. This Court's Decision in *Freightliner* Has Caused Great Confusion Over Whether the Safety Act Preempts Common Law Claims.

The reason that the lower courts continue to disagree about

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[4] At the state intermediate appeals court level, *see, e.g., Ketchum v. Hyundai Motor Company*, _ P.2d _, No. B077874 (Cal. Ct. App. Oct. 11, 1996) (no lap belt, no preemption, implied preemption barred); *Nissan Motor Corp v. Superior Court*, 261 Cal. Rptr. 80 (Cal. Ct. App. 1989) *cert. den.*, 494 U.S. 1066 (1990) (no airbag, implied preemption); *Loulos v. Dick Smith Ford, Inc.*, 882 S.W.2d 149 (Mo. Ct. App. 1994) (no airbag, no preemption, implied preemption barred); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div.), *cert. den.*, 649 A.2d 1291 (N.J. 1994) (no lap belt, express preemption); *Panarites v. Williams*, 629 N.Y.S. 2d 359 (N.Y. App. Div. 1995) (no airbag, express and implied preemption); *Minton v. Honda of America Mfg. Inc.*, 1996 WL 402070 (Ohio App. 1996) *review granted*, No. 96-2006 (Ohio Oct. 23, 1996) (no airbag, implied preemption); *Nelson v. Ford Motor Company*, 670 N.E. 2d 307 (Ohio Ct. App. 1996), *review granted*, No. 96-2006 (Ohio Oct. 23, 1996) (no airbag, no preemption, implied preemption barred); *Attocknie v. Carpenter Manufacturing, Inc.*, 901 P.2d 221 (Okla. App. 1995) (no lap belt, no preemption, implied preemption barred); *Cellucci v. General Motors Corp.*, 676 A.2d 253 (Pa. Super. 1996) (en banc), *review granted*, No. 0379 (Pa. Oct. 22, 1996) (no airbag, implied preemption); *Muntz v. Commonwealth of Pennsylvania*, 674 A.2d 238 (Pa. Commw. Ct. 1996) (no airbag, no preemption); *Alvarado v. Hyundai Motor Company*, 908 S.W.2d 243 (Tex. Ct. App. 1995), *appeal pending*, No. 95-0969 (Tex.) (no lap belt, no preemption); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. – Dallas 1993, no writ) (no airbag, implied preemption); *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754 (Wis. Ct. App. 1994), *cert. den.*, No. 94-1910, 1995 WL 334794 (Oct. 2, 1995) (no lap belt, express preemption); *Boyle v. Chrysler Corp*, 501 N.W.2d 865 (Wis. Ct. App. 1993) (no airbag, express preemption).

the Safety Act's preemptive effect is the confusion created by this Court's decision in *Freightliner* -- confusion which only this Court can eliminate. To appreciate why *Freightliner* caused such confusion, it is essential to understand the context in which *Freightliner* took place.

As we noted above, for twenty years after the Safety Act's 1966 enactment, the nation's appellate courts unanimously agreed that the Safety Act does not preempt common law claims. *See* pp. 8-9, *supra*. In 1986, however, the U.S. Court of Appeals for the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d at 181, expanding the implied preemption doctrine to find certain common law claims involving cigarettes preempted despite Congress' intent to the contrary. Within a year, the First and Eleventh Circuits issued similar decisions. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

Before this Court had an opportunity to overturn these decisions, the defective strain of implied preemption analysis adopted in the cigarette cases infected the interpretation of the Safety Act. In 1988, the First Circuit heard *Wood*, 865 F.2d 395, in which General Motors was arguing, as it had repeatedly argued in the past, that it was exempt from common law liability because it had complied with a Federal motor vehicle safety standard -- specifically, Standard 208 governing occupant restraints. In a two-to-one decision, with Judge Selya dissenting, the First Circuit explicitly adopted the rationale of *Palmer*, its recent cigarette labeling decision, and became the first appeals court in the nation to find a common law claim impliedly (but not expressly) preempted by the Safety Act, despite Congress' clear statement of anti-preemptive intent. *Wood*, 865 F.2d at 410-11. In the next three years, the Third, Tenth, and Eleventh Circuits (and several lower courts) followed, albeit on varying rationales. *See Pokorny*, 902 F.2d at 1116; *Kitts*, 875 F.2d at 787; *Taylor*, 875 F.2d at 816.

In 1992, however, this Court issued its decision in *Cipollone*, 112 S. Ct. at 2608, explicitly rejecting the Third Circuit's (and its sister courts') expansion of the implied preemption doctrine. In a portion of the opinion joined by seven members of this Court, it said:

> In our opinion, the pre-emptive scope of the [two statutes at issue] is governed entirely by the express language in . . . each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

112 S. Ct. at 2618. Thus, *Cipollone* held that the lower courts had erred in finding *implied* preemption of any common law claims involving cigarettes and that only *express* preemption analysis should have been employed. *Id.*

The *Cipollone* decision effectively overruled the decisions finding implied preemption under the Safety Act. It should have returned the lower courts to their unanimous view that the Safety Act expressly preserves all common law claims. And it probably would have done so, if not for the confusion caused by *Freightliner*.

In *Freightliner*, this Court reviewed the first decision by a federal appeals court or state court of last resort to interpret the Safety Act's preemptive effect after this Court's decision in *Cipollone*. In the decision being reviewed, *Myrick*, 13 F.3d at 1522, the Eleventh Circuit first stated *Cipollone*'s teaching broadly, noting "*Cipollone*'s clear instruction that when there is an express pre-emptive provision we should not consider implied

preemption."[5] It later said, however, that "at the very least" *Cipollone* "establishes there is a presumption that a pre-emption clause is a reliable indicium of congressional intent" and that, "[e]ven without such a presumption we would be convinced that the express preemption provisions of the Safety Act are a reliable indicium of congressional intent." *Myrick*, 13 F.3d at 1525. The Eleventh Circuit concluded that *Cipollone* negated its prior implied preemption decision in *Taylor*, that section 1397(k) barred resort to implied preemptive analysis under *Cipollone*, and that the Safety Act expressly preserves all common law claims. *Myrick*, 13 F.3d at 1522-28.

In *Freightliner*, 115 S. Ct. at 1437, this Court affirmed on alternative grounds, but issued a decision that has created great confusion as to whether implied preemption analysis is appropriate under the Safety Act. Perhaps focussing on the Eleventh Circuit's broadest summary of *Cipollone*'s impact, the Court said that the Eleventh Circuit had misread *Cipollone* to hold "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute" and rejected that position as "without merit." *Freightliner*, 115 S. Ct. at 1487. The Court then attempted to clarify the proper approach to preemption analysis, saying:

> The fact that an express definition of the pre-emptive reach of a statute "implies" -- i.e., supports a reasonable inference -- that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption . . . At best,

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[5] This statement tracked language in *Cipollone* itself. *See Cipollone*, 112 S. Ct. at 2625 (Blackmun J., concurring in part and dissenting in part) ("We resort to principles of implied pre-emption . . . only when Congress has been silent with respect to pre-emption"); *id.* at 2633 (Scalia, J., dissenting in part and concurring in the judgment) ("Once there is an express pre-emption provision, in other words, all doctrines of implied pre-emption are eliminated.")

> *Cipollone* supports an inference that an express preemption clause forecloses implied preemption; it does not establish a rule.

Freightliner, 115 S. Ct. at 1488.

In regard to *Cipollone*, these statements made perfect sense. The two statutes at issue in *Cipollone* contained express preemption clauses (but, unlike, the Safety Act, no express *anti-preemption* clause). The fact that Congress thought to include those express clauses in the statutes did not, without more, necessarily mean that Congress also thought of all other aspects of state law that might be preempted by the statutes -- and intended to preserve them.

In the Safety Act, however, there is more than just an express preemption clause. There is an express *anti-preemption* clause explicitly preserving all common law claims. In *Freightliner*, however, this Court did not acknowledge that fact. Instead, it simply said the Eleventh Circuit's interpretation of *Cipollone* was "without merit" and then made the statements quoted above. *Freightliner*, 115 S. Ct. at 1487-88. As a result, *Freightliner* has created extensive confusion as to whether section 1397(k) precludes a resort to implied preemption under the Safety Act.[6]

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[6] For example, after originally finding in *Hernandez-Gomez*, 884 P.2d at 191, that section 1397(k) bars resort to implied preemption analysis, the Supreme Court of Arizona said, on remand after *Freightliner*: "[A]lthough we agree that it is possible the presence of a savings clause categorically precludes preemption, the [U.S. Supreme] Court did not address the issue and we cannot tell from the language in [*Freightliner*] that it would necessarily agree with such an interpretation. It is clear to us, however, that at the very least [*Freightliner*] stands for the proposition that common-law claims that expressly and directly conflict with the text of the standard are preempted by the preemption clause; common-law claims that do not expressly conflict may still be preempted if they violate one of the articulated rules for implied preemption; common-law claims that are neither expressly nor impliedly preempted are saved. Despite the existence of the savings clause, therefore, we proceed with . . . implied

The confusion caused by the discussion of *Cipollone* in *Freightliner* was massively compounded by the preemption analysis actually employed in *Freightliner*. *Cipollone* stressed the importance of focussing on the words Congress used to determine whether express preemption exists. In *Freightliner*, however, this Court did not reach the question of whether 15 U.S.C. § 1392(d) expressly preempts common law claims or 15 U.S.C. § 1397(k) expressly preserves them. *Freightliner*, 115 S. Ct. at 1487 n.3. Instead, it rejected express preemption solely because section 1392(d), by its terms, only applies, "whenever a Federal motor vehicle safety standard is in effect" with respect to the relevant "aspect of performance" and no such Federal standard was in effect with regard to the aspect of performance (truck stopping distances) at issue in the case. *Freightliner*, 115 S. Ct. at 1147. This has prompted some courts -- including the Supreme Court of Idaho -- to hold (incorrectly) that *Freightliner* affirmatively supports a finding of express preemption whenever a Federal safety standard is in place, despite the clear words of the savings clause.

In addition, *Cipollone* stressed the importance of focussing on the words Congress used to determine whether resort to implied preemption analysis is proper, but *Freightliner* did not follow that step. Instead, without reaching respondents' arguments about the words Congress used, *id.* at 1487 n.3 (and after saying the Eleventh Circuit misinterpreted *Cipollone* as unduly barring implied preemption), the Court rejected the petitioners' preemption argument as "ultimately futile" because respondents' common law claims did not "conflict with federal law" sufficiently to warrant a finding of implied preemption. *Freightliner*, 115 S. Ct. at 1488. This has prompted some courts to hold (incorrectly) that *Freightliner* mandates resort to -- and even a finding of -- implied

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preemption analysis . . . because this case has been in our judicial system since 1990, has now been before this Court twice and before the United States Supreme Court once." *Hernandez-Gomez*, 917 P.2d at 243. *See also* footnote 7 *infra*.

preemption under the Safety Act.[7]

Thus, while *Freightliner* may have clarified the proper approach to preemption analysis in cases like *Cipollone*, where the statutes involved contain only express preemption clauses, it has created massive confusion among the lower courts about the preemptive affect of the Safety Act. Only this Court can resolve that confusion. To do so, it should grant review in this case and answer the critically-important federal question presented.

3. Whether the Safety Act Preempts Common Law Claims is An Important Question of Federal Law.

The question of federal law presented by this case is extremely important. It boils down to this: whether courts are free to disregard the argument against preemption, contravene Congress' plainly-stated intent, and exempt manufacturers from liability under state common law by judicial decree. VW and its fellow manufacturers agree that the question presented is important. One year ago, they jointly urged this Court to decide whether compliance with Standard 208 renders them immune from common

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[7] *See, e.g., Cooper v. General Motors Corp.*, 1996 WL 272362 at *15 (citing *Hill v. General Motors Corp.*, No. Civ. 94-AR-0088-S (W.D. Ala. Nov. 15, 1995)) ("While this Court is somewhat notorious for its perceived inability to predict the direction of Eleventh Circuit jurisprudence, it does know a slam dunk when it sees one. The directive from *Freightliner Corp.* is clear: 'Go back to *Taylor*.'") *See also Wilson*, 660 N.E.2d at 339 (Dickson, J., concurring) (quotations and citations deleted) ("Unlike the majority, I would not hold that the § 1397(k) preemption clause entirely forecloses any possibility of implied preemption in this case. The United States Supreme Court in *Freightliner* was faced with the same statute – with the same preemption clause and savings clause – that is before us in the present case. Rather than disposing of the issue by declaring implied preemption to be foreclosed, the *Freightliner* majority in fact performed an implied preemption analysis, concluding that compliance with both federal and state law was not impossible and that the lawsuit did not frustrate congressional objectives. That the [*Freightliner*] court expressly conducted such an analysis leads me to conclude that we must do likewise.")

law liability. *Ford Motor Company v. Tebbetts*, No. 95-709 (October Term, 1995), Brief of the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers, Inc. as *Amici Curiae* Supporting the Petition. They simply maintain that the answer is "yes," even though it is "no."

Six months ago, this Court again re-emphasized that two controlling principles guide preemption analysis. First, the inquiry starts with a presumption *against* preemption, "particularly when Congress has legislated in a field which the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996) ("*Medtronic*"). This approach "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.* Second, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* "As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of *congressional purpose*." *Id.* (emphasis in original).

Both of these principles are violated by the express preemption decision below and the decisions finding implied preemption under the Safety Act. In the decision below, the Supreme Court of Idaho failed to acknowledge -- and plainly disregarded -- the presumption against preemption. Instead, it cited the U.S. Constitution's Supremacy Clause for the proposition that "any state law which conflicts with federal law is without effect." App. 6. (quotations deleted). The implied preemption decisions do no better. Some fail to mention the presumption against preemption, others give it lip service, but the weight they give it is the same: virtually none. *See, e.g., Wilson*, 660 N.E.2d at 336 ("First and foremost, we emphasize that the *Wood* majority ignored the presumption against preemption.").

The decision below and the implied preemption decisions also contravene Congress' plain statement of intent. Congress could hardly have said it more clearly: "Compliance with *any*

Federal motor vehicle safety standard . . . shall not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added). As the United States explained in its *amicus* brief to this Court in *Freightliner*:

> [U]nder a straightforward reading of Section 1392(d) and Section 1397(k), taken together, States are preempted from adopting prescriptive safety standards by legislative or administrative action if NHTSA has established a safety standard governing the same aspect of performance. . . State courts, however, are not precluded by those provisions from entering tort judgments in cases raising the claim that a vehicle or item of equipment was defectively designed with respect to that same aspect of performance.

Freightliner Corp. v. Myrick, No. 94-286 (October Term, 1994), Brief for United States as *Amicus Curiae* Supporting Respondents, at 16.

If the plain words of the Safety Act left any question as to Congress' intent in regard to common law claims, it would surely be answered by the statute's legislative history. The House Committee, which added section 1397(k) to the Safety Act, explained its purpose in clear and unequivocal terms:

> It is intended and this subsection specifically establishes, that *compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly* those relating to warranty, contract, and *tort liability*.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

Given the foregoing, the decision below is plainly in error, as are those cases resorting to implied preemption analysis. In both *Cipollone* and *Medtronic*, this Court found that Congress' enactment of express preemption provisions, standing alone, barred resort to implied preemption principles, even though the members of the Court disagreed vehemently as to the meaning of the express preemption provisions. *See Cipollone*, 112 S. Ct. at 2618; *Medtronic*, 116 S. Ct. at 2250. Here, Congress enacted both an express preemption provision and an express anti-preemption provision explicitly preserving the aspect of state law at issue. To allow implied preemption under these circumstances would render the limitations imposed on implied preemption in *Cipollone* and *Medtronic* meaningless -- and make implied preemption analysis a tool for wholesale judicial activism and the widespread evasion of Congress' intent.

Moreover, even if implied preemption could properly be considered under the Safety Act, claims like plaintiffs' still would not be preempted. There simply is no conflict between plaintiffs' claims and Standard 208. It is true that Standard 208 required all 1987 model-year cars to have, at a minimum, either (1) a manual lap belt and shoulder harness, (2) an automatic belt system providing at least a specified level of protection in head-on crashes, or (3) an airbag or other device providing automatic protection in head-on and angular crashes. It is equally true that VW, which chose the second option, could have installed a lap belt (or for that matter, an airbag) in Ms. Zimmerman's 1987 Volkswagen Golf *in addition to* the automatic shoulder harness and knee bolster it installed, and still have complied with that option under Standard 208. And it is obvious that, if VW had taken that step, Dorothy Zimmerman's 1987 Volkswagen Golf would have been safer. If, by failing to install a lap belt, VW violated Idaho common law and caused Dorothy Zimmerman's death, Congress did not intend to exempt VW from liability. Section 1397(k) makes that fact plain.

This Court has repeatedly refused to find that Congress intended to deprive tort victims of common law remedies, even

when Congress has not expressly preserved common law claims, saying "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Medtronic*, 116 S. Ct. at 2251 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). In this case, Congress *did* comment and it expressly *preserved* all common law claims. This Court should grant review to ensure that Congress' intent is respected and that the Zimmermans -- and thousands of similarly situated Americans -- are not illegally denied their day in court.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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